Supreme Court, U.S.
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No. 96-1763

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MARSHALL SPIEGEL,

Petitioner,

v.

JAMES MESCALL and HOLLYWOOD TOWERS CONDOMINIUM ASSOCIATION,

Respondents.

On Petition for Writ of Certiorari to the Illinois Supreme Court

JAMES MESCALL AND HOLLYWOOD TOWERS CONDOMINIUM ASSOCIATION'S JOINT BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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LIST OF INTERESTED PARTIES

Petitioner has not separately provided a list of all parties to the proceeding in the court whose judgment is sought to be reviewed. Thus, to assist this Court, Respondents state as follows:

1. The Petitioner is Marshall Spiegel.

2. The Respondents are correctly identified in the caption as James Mescall and Hollywood Towers Condominium Association, an Illinois not-for-profit corporation.

3. This Brief in Opposition is filed on behalf of both James Mescall and Hollywood Towers Condominium Association.

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Respondents, James Mescall and Hollywood Towers Condominium Association, request that this Court deny the Petition for *Writ of Certiorari* seeking review of an unpublished Order of the Illinois Appellate Court, First District. The Appellate Court's Order appears in the Petition Appendix 1a-13a. The orders of the trial court are not reported. (Pet. App. 2a-3a).

STATEMENT OF JURISDICTION

The sole question advanced for review by the Petition was never presented to the Illinois courts. Thus, this Court cannot properly exercise jurisdiction over this case, pursuant to 28 U.S.C. §1257(a), because these newly presented arguments may not properly be considered by *Writ of Certiorari.*

STATEMENT OF THE CASE

Respondents respectfully oppose the Petition for *Writ of Certiorari.* For the most part, the Petition assails the Illinois judiciary's holding that Petitioner "failed to introduce any evidentiary material rebutting the statutory presumption." (Pet. App. 10a). As the Illinois Appellate Court's Order reveals, the touchstone of this case is not constitutional but whether Petitioner carried his factual burden of demonstrating "that a genuine issue of material fact exists." (Pet. App. 8a). Thus, the Illinois courts did not deny Petitioner's due process rights but, rather, entered judgment in favor of Respondents only after Petitioner failed to introduce "any evidentiary material" to create a genuine issue of material fact. Review of such

factual disputes are not an appropriate basis on which to grant *certiorari*.

Trial Proceedings And Disposition Of The Case Below.

The case now before this Court is, in fact, two separate matters filed in the Illinois trial courts and consolidated on appeal. The first case, number 93 L 7536, was filed against James Mescall alleging, *inter alia*, defamation. In that matter, the trial court granted summary judgment in favor of defendant on the defamation count. In ruling on that motion, the trial judge expressly recognized that Petitioner did not present any competent evidentiary material to establish the existence of a triable issue and observed that the defamation claim was "perilously close to a baseless count." Thus, the issue on appeal was limited to "whether a genuine issue of fact exists." (Pet. App. 6a). In ruling on that issue, the Appellate Court found Respondent "Mescall did not solely rely on the allegations of plaintiff's complaint and the statutory presumption [under the Illinois DCFS Act] arising therefrom in support of his motion for summary judgment." (Pet. App. 7a). Thus, the Appellate Court focused on the fact that "in this case, there was no competent evidence . . . and conclude[d], as did the trial court, that the plaintiff failed to introduce any evidentiary material rebutting the statutory presumption." (Pet. App. 9a).

While the motion for summary judgment in that matter was pending, Petitioner filed a second action, number 94 L 6465, against Hollywood Towers. In this second action, Petitioner incredibly alleged that the Association

was guilty of slander based upon the exact same statements allegedly made by Mescall. Because of the absolute identity between these two matters, the Illinois trial court dismissed this second defamation claim on the basis that the judgment in the first action wholly disposed of the case.[1] The proceedings in the Illinois courts make clear that Petitioner was *not* denied any constitutional guarantees but, rather, simply failed to carry his factual, evidentiary burden. Most telling, Petitioner does not cite to any part of the record suggesting otherwise. Consequently, as this Court does not hear factual disputes, it is inappropriate to seek *certiorari*.

REASONS FOR DENYING THE PETITION

I.

This Court Has No Jurisdiction To Consider Petitioner's Arguments.

This Court's review of judgments rendered by state courts is limited to circumstances where federal questions have been *both* raised and decided in the state court below. *Yee v. City of Escondido*, 503 U.S. 519, 523-33 (1992) (refusing to consider constitutional claims that were not raised or addressed below); *Beck v. Washington*, 369 U.S. 541, 549-53 (1962) ("unbroken line of precedent" refusing to consider issues which the Petitioner

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[1] In addition, the Appellate Court recognized that Petitioner failed to address "propriety of the order [dismissing the Association] in his briefs and appeal." Thus, Petitioner has waived any claim of error he might have regarding the judgment in favor of the Association.

failed to argue in state court). Illinois law is consistent and similarly holds that arguments not presented and preserved in the trial court cannot be presented in the Appellate or Supreme Court. *Eagan v. Chicago Transit Authority*, 158 Ill.2d 527, 534 (1994).

Significantly, even the Appellate Court determined that Petitioner waived any claim of error. (Pet. App. 12a). Nevertheless, for the first time, Petitioner now argues that he has been denied his due process rights. Significantly, Petitioner never cited the due process clause to any Illinois court. That was, of course, despite the fact that he filed not one but two separate actions in the trial courts, presented briefs and arguments to the Illinois Appellate Court and even sought, unsuccessfully, leave to appeal to the Illinois Supreme Court. Most telling, however, Petitioner himself admits that he failed to cite to or argue that his due process rights were abridged. (Pet. p. 3, fn. 1). Thus, for this fundamental reason, Petitioner should not be permitted to seek review on such a specious constitutional ground.

II.

This Court Does Not Review Factual Issues.

Separate and apart from the fact that Petitioner's current argument has been waived, the Illinois court's decisions rest on the finding that Petitioner did not submit "competent evidence." Such a finding, especially by a state court, presents no issue deserving of this Court's attention. *See, Graver Tank and Manufacturing Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949), *rehearing granted*, 337 U.S. 910 (1949), *adhered to in part, re-*

versed in part, 339 U.S. 605 (1950). Indeed, this Court's comments in *Graver* are telling: "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of the very obvious and exceptional show of error." Here, not only is there no exceptional show of error, there was no error at all and Petitioner does not argue that there was. At best, this petition seeks review based on a factual disagreement. *Certiorari* to review factual determinations is not permitted.

III.

The Illinois Courts Did *Not* Compromise Petitioner's Right To Due Process.

Even if this Court were to look beyond the clear infirmities of the Petition for *Writ of Certiorari*, the Illinois courts did not compromise any right to due process. To the contrary, Petitioner is patently incorrect when he suggests that the Illinois courts somehow deprived him of "an effective remedy for the vindication of their [sic] rights under the federal constitution." (Pet. App. 5). All that the Illinois courts did was decide that the Petitioner failed to present competent evidence. Reference to the Illinois Appellate Court's decision is most telling. At the expense of brevity but in the hope of clarity, the Illinois court did not rely merely on the statutory presumption in the DCFS Act but, instead, ruled that "plaintiff failed to introduce any evidentiary material rebutting the statutory presumption." Thus, on its fact, the court did not abridge due process but, rather, recognized Petitioner's failure to create a triable factual issue.

CONCLUSION

Based on the foregoing reasons, Respondents respectfully submit that the *Writ of Certiorari* should be denied.

Respectfully submitted,

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